85-2156

No. A-876

Supreme Court, U.S.
FILED
JUL 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SHAARE TEFILA CONGREGATION, *et al.*,
Petitioners,

v.

JOHN WILLIAM COBB, *et al.*,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1544

SHAARE TEFILA CONGREGATION, individually, and on behalf of its members; RABBI MARTIN S. HALPERN; SHIRLEY ALTMAN; WILLIAM HARKAWAY; MARSHALL S. LEVIN; MAURICE POTOSKY and DR. JACOB TELLER,
Appellants,

and

AETNA CASUALTY & SURETY COMPANY,
Plaintiff,

versus

JOHN WILLIAM COBB; WILLIAM RANDALL HARRIS; THOMAS LLOYD HEINE; WILLIAM HESS; THOMAS JOSEPH HUNT, JR.; RAYMOND LEE JORDAN; DOMINIC QUEEN and MICHAEL DAVID REMER,
Appellees.

Appeal from the United States District Court
for the District of Maryland, at Baltimore
Norman P. Ramsey, District Judge—(C/A 84-880)

Argued: November 5, 1985 Decided: March 7, 1986

Before HALL, MURNAGHAN, and WILKINSON, Circuit Judges.

Patricia A. Brannan (William A. Bradford, Jr.; Daniel S. Cohen; Steven P. Hollman; P. Dustin Finney, Jr.; Hogan & Hartson; Irvin N. Shapell; Jewish Advocacy Center on brief) for Appellants; Deborah T. Garren (Robert B. Barnhouse; Piper & Marbury; Joseph M. Niland on brief) for Appellees.

HALL, Circuit Judge:

Shaare Tefila Congregation and individual representatives of the class comprised of its members and employees appeal from the district court's order dismissing their action against defendants.[1] Plaintiffs brought this action pursuant to 42 U.S.C. §§ 1981, 1982 and 1985(3) and the Maryland common law of trespass, nuisance, and intentional infliction of emotional distress. We affirm.

I.

Shaare Tefila Congregation is a Jewish community of approximately 500 member families, who assemble at their synagogue in Silver Spring, Maryland, in order to worship and engage in community activities. On the evening of November 2, 1982, members and employees of Shaare Tefila Congregation met at the synagogue for activities, including a board of directors' meeting. Marshall S. Levin, the Executive Director of Shaare Tefila Congregation, remained at the synagogue after the meeting. There, he received a telephone call from Dr. Jacob Teller, one of the board members, informing him that Teller's car had been spray-painted with a swastika while parked at the synagogue for the meeting. When Levin went outside to search for possible further damage, he discovered that the white outside walls of the synagogue had been spray-painted in red and black with large anti-Semitic slogans and symbols, which included the words

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[1] Defendants are private individuals who allegedly vandalized plaintiffs' synagogue.

"Death to the Jude," "In, Take a Shower Jew," "Toten Kamf Raband," and "Dead Jew," swastikas, a skull and cross bones, and Ku Klux Klan symbols.

On March 16, 1984, Shaare Tefila Congregation and several of its members and employees (the "Congregation") filed this civil rights class action against defendants in federal district court. In its complaint, the Congregation alleged violations of 42 U.S.C. §§ 1981, 1982, and 1985(3) and the Maryland common law of trespass, nuisance, and intentional infliction of emotional distress.

Before the completion of discovery, one of the defendants filed a motion under Fed. R. Civ. P. 12(b)(1) and (6) to dismiss the complaint. The district court granted the motion. The Congregation's section 1981 claim, alleging that defendants' conduct deprived plaintiffs of the full and equal benefit of the laws, was dismissed on the ground that it did not involve any state action. *Shaare Tefila Congregation v. Cobb*, 606 F. Supp. 1504, 1506-07 (D. Md. 1985). The district court dismissed the Congregation's section 1982 claim after concluding that discrimination against Jews is not race discrimination within the meaning of the statute. *Id.* at 1507-09. The court refused to adopt the Congregation's position that the racial animus requirement of section 1982 is satisfied if defendants are motivated by a perception that plaintiffs are racially distinct, reasoning that such a position relies "entirely on the idiosyncracies of individual defendants." *Id.* at 1508.

In view of its dismissal of appellant's claims under sections 1981 and 1982, the district court also dismissed the Congregation's section 1985(3) claim insofar as it alleged a conspiracy to deprive appellant of rights under sections 1981 and 1982. *Id.* at 1509. The district court further held that neither the federal constitutional right to interstate travel nor the various state rights asserted by appellant could support a cause of action under section 1985(3). Specifically, the court found that appel-

lant's claim concerning the right to interstate travel was based on conclusory allegations and that section 1985(3) reaches only federal—not state—rights. *Id.* at 1509-10.

Because of its dismissal of all of the Congregation's federal claims, the district court also dismissed the pendent state claims. *Id.* at 1510. In addition, although the motion to dismiss was filed on behalf of only one defendant, the district court found that its rulings required dismissal of the entire action against all of the defendants. *Id.*

This appeal followed.

II.

On appeal, the Congregation contends that the district court erred in dismissing its claims under sections 1981, 1982, and 1985(3). We disagree.

Section 1981 provides, in pertinent part, as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.

With respect to its section 1981 claim, the Congregation alleged in its complaint that "[d]efendants' desecration of the synagogue . . . deprived plaintiffs of the full and equal benefit of laws for the security of persons and property. Defendants' desecration . . . was motivated by racial prejudice in that defendants perceive plaintiffs as racially distinct because they are Jews."

The Congregation acknowledges on appeal that no state action was involved in defendants' acts. It maintains, however, that the district court erred in concluding that state action is required in order to bring a "full and equal benefit" action under section 1981. We, however, agree

with the Third Circuit's interpretation of the "full and equal benefit" clause of section 1981 and conclude that state action is required in order to assert a claim under that statute. *See Mahone v. Waddle*, 564 F.2d 1018 (3d Cir. 1977), *cert. denied*, 438 U.S. 904 (1978).

In *Mahone*, the Third Circuit distinguished the "full and equal benefit" clause of section 1981 from the "contracts" clause of that statute. It noted that the right "to make and enforce contracts" was by nature concerned with relationships between private parties, and a prohibition against race discrimination in the private sector was readily implied. On the other hand, the Third Circuit stated:

> The words "full and equal benefit of all *laws and proceedings* for the security of persons and property" (emphasis supplied) . . . suggest a concern with relations between the individual and the state, not between two individuals. The state, not the individual, is the sole source of law, and it is only the state acting through its agents, not the private individual, which is capable of denying to blacks the full and equal benefit of the law. Thus, while private discrimination may be implicated by the contract clause of section 1981, the concept of state action is implicit in the equal benefit clause.

Id. at 1029. Because appellant's section 1981 "full and equal benefit" claim does not involve any state action, we find that the district court did not err in dismissing that claim. Moreover, for the reasons discussed in the next section, we conclude that the requisite racial motivation to sustain a section 1981 claim was lacking.

III.

Next, the Congregation alleges that the district court erred in dismissing its section 1982 claim. Section 1982 states that "[a]ll citizens of the United States shall have

the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." Appellant's section 1982 claim, as stated in its complaint, was that "[d]efendants' desecration of the synagogue ... deprived plaintiffs of the right to hold real and personal property. Defendants' desecration of the synagogue was motivated by racial prejudice in that defendants perceive plaintiffs as racially distinct because they are Jews."

Appellant argues that the district court's dismissal of its section 1982 claim is erroneous as a matter of law because defendants' desecration of the synagogue had a racial character, was motivated by racial animus and, thus, is actionable under section 1982. The Congregation maintains that Jews are not members of a racially distinct group and do not wish to be so considered. It nevertheless argues that because defendants viewed Jews as a racially distinct group, defendants' acts constituted racial discrimination in violation of section 1982. In support of its argument, the Congregation relies upon the Tenth Circuit's decision in *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1979). We reject appellant's contentions and find nothing in the statute, its legislative history, or subsequent case law which would lead us to conclude that section 1982 was intended to apply to situations in which a plaintiff is not a member of a racially distinct group but is merely *perceived* to be so by defendants. We conclude that *Manzanares* is, if correct at all, inapposite.

Manzanares involved a section 1981 action brought by a plaintiff of Mexican-American descent against his employer and labor union, alleging that he was discriminated against due to his race and/or national origin in that he was treated differently from Anglo-Americans. The Tenth Circuit concluded that "section 1981 is directed to racial discrimination primarily, but is not necessarily limited to the technical or restrictive meaning of 'race,'"

id. at 971, and held that the plaintiff's contentions were sufficient to state a claim under section 1981. Appellants urge us to extend the Tenth Circuit's reasoning here. We decline to do so. *Manzanares* did not hold that a defendant's mere perception of a plaintiff as racially distinct is sufficient to constitute racial discrimination in violation of section 1981. Instead, the Tenth Circuit emphasized that Mexican-Americans, as a group, are commonly treated differently from Anglo-Americans, as a group. We do not find the position of Jews in this society to be analogous to that of Mexican-Americans or others commonly considered to be non-whites.

Although we sympathize with appellant's position, we conclude that it cannot support a claim of racial discrimination solely on the basis of defendants' perception of Jews as being members of a racially distinct group. To allow otherwise would permit charges of racial discrimination to arise out of nothing more than the subjective, irrational perceptions of defendants. Such perceptions are not what section 1982 was intended to protect against. Because discrimination against Jews is not racial discrimination, and the Supreme Court has stated that section 1982 does not address discrimination on account of religion or national origin, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968), we find that the district court properly dismissed the Congregation's section 1982 claim.

IV.

Appellant's last contention is that the district court erred in dismissing its section 1985(3) conspiracy claim.[2]

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[2] Section 1985(3) provides in pertinent part, the following:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . in any case of conspiracy set forth in this section,

In that claim, the Congregation alleged, *inter alia*, the following:

> By conspiring to and desecrating the synagogue . . . defendants conspired for the purpose of depriving, either directly or indirectly, the class of members of . . . [the] Congregation of the equal protection of the laws or of equal privileges and immunities under the laws, including, but not limited to, plaintiffs' federal constitutional right to travel, 42 U.S.C. §§ 1981 and 1982, . . . Maryland criminal laws prohibiting destruction of property and conspiracy to destroy property, and Maryland common law prohibiting trespass, nuisance and intentional infliction of emotional distress.

On appeal, the Congregation asserts that its section 1985(3) claim should not have been dismissed, because it stated valid causes of action under sections 1981 and 1982. In addition, appellant argues that the district court erred in holding that its complaint failed to support a cause of action under section 1985(3) based on its federal constitutional right to interstate travel. The Congregation maintains that from its allegations in the complaint as to the location of the synagogue, the residency of the synagogue's members, the conduct of the defendants, and the effect of that conduct on appellant, a finder of fact could conclude that the purpose and effect of defendants' conspiracy was to deprive congregants of their right to engage in interstate travel. Finally, the Congregation disputes the district court's conclusion that appellant did not state a section 1985(3) claim for violation of its rights under Maryland law. It asserts that

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if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

state law rights are appropriate rights upon which to base violations of section 1985(3).

The Congregation cannot base its section 1985(3) claim on sections 1981 and 1982, because, for the reasons discussed in the preceding sections of this opinion, it failed to state causes of action under those statutes. We reject appellant's remaining contentions as to its section 1985(3) claim upon the reasoning of the district court. *Shaare Tefila Congregation*, 606 F. Supp. at 1509-10.

V.

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED

MURNAGHAN Circuit Judge concurring:

Bearing in mind that hard cases pose the risk of making bad law the present controversy constitutes a hard case. The behavior of which the defendants stand accused was execrable. In also reaching the conclusion Judge Hall has expressed, I nevertheless steadfastly hope that, if the allegations are supported by proof, stern retribution under the laws of Maryland will be meted out to the defendants.

Yet the law is grounded on facts, not on misperceptions of fact. For persons of the ilk which the defendants, at the present posture of the case, are revealed to be to have the power to confer jurisdiction on the federal courts would, in all probability, lead to very regrettable consequences.

I think not only of Jews and the regrettable indignities they may well have suffered here at the hands of the defendants. I cannot say that my sympathies for the first time go out to them only because those sympathies have already gone out to the Jews long ago and on many occasions as bad as or far worse than the instant one.

My ethnic origins are principally Hibernian. On March 17, for one group of Irish hotheads and on July 12 for another (as well as other dates during the year), violence deriving from misperceptions, of Catholics on the one hand, or of Protestants on the other, as an inferior human sort or race has broken out, to my everlasting regret from time to time. Yet it will but contribute to disruption of our nation to accord such ill mannered and unreasoned fracases the dignity of status as civil rights controversies. They belong in the state courts, where justice, more immediate and more personalized, is likely to be at hand.

Accordingly, I concur in the conclusion that 42 U.S.C. §§ 1981, 1982 and 1985(3) do not afford a basis for bringing suit in the circumstances here involved.

WILKINSON, Circuit Judge, concurring in part, dissenting in part:

I cannot accept the majority's view that the civil rights statutes invoked here fail to protect against racial discrimination based on "nothing more than the subjective, irrational perceptions of defendants." *Ante* at 8. All racial prejudice is the result of subjective, irrational perceptions, which drain individuals of their dignity because of their perceived equivalence as members of a racial group. The Civil Rights Acts of 1866 and 1871 were enacted precisely to halt the spread of violence and hatred by those motivated by such perceptions, and plaintiffs in this case, no less than those in the usual racial discrimination case, have suffered the consequences of abhorrent notions concerning racial identity and its relevance. Rather than allowing ignorance and misperception to provide their own defense, I would find the erroneous but all too sincere view of defendants that Jews constitute a separate race worthy of humiliation and degradation sufficient to bring the claim within 42 U.S.C. §§ 1982 and 1985(3).[1]

I.

Because the majority opinion leaves the impression that the incident at issue here was an isolated event with only speculative racial overtones, it is necessary to examine the broader context in which the desecration of Shaare Tefila Synagogue occurred. The posture of this case, of course, requires that we take the allegations of the complaint as

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[1] I agree with the majority that the "full and equal benefit" clause of 42 U.S.C. § 1981 requires state action, and accordingly join in part II of its opinion. It should be noted, however, that my discussion of racial discrimination under § 1982 applies with equal force to § 1981 where other predicates for § 1931 coverage are established. I too would affirm the district court's conclusion that § 1985(3) actions may not be grounded solely in violations of state law. Because I disagree with the view that § 1982 does not apply, however, I would reinstate plaintiffs' § 1985(3) conspiracy claim to the extent it alleges a conspiracy to violate § 1982.

true and consider only the legal adequacy of the facts as alleged. Here, we find that defendants' activities on the evening of November 1, 1982 started when they gathered behind a Drug Fair store at a shopping center in Silver Spring, Maryland. While the eight defendants drank and talked, they spray painted the outside walls of the store with anti-Semitic slogans and symbols, including "Arian [sic] Brotherhood," "White Power," "KKK," an eagle with a swastika, and a Star of David with an arrow through it. Defendants also painted their initials on the Drug Fair wall.

During this time, one of the group suggested that "somebody should do that to a synagogue." Apparently heeding this suggestion, defendants proceeded toward the nearby grounds of Shaare Tefila Congregation. On their way, they painted a swastika on the car of synagogue member Jacob Teller, parked outside the synagogue. Defendants then entered the grounds of the synagogue and painted offensive symbols and slogans on the building similar to those painted at the Drug Fair. These included swastikas, a skull and crossbones, a burning cross, and the slogans "Dead Jew," "Death to the Jude," "Ku Klux Klan," and on a doorway the words "In, Take a Shower Jew." Also found on the building was the phrase "Toten Kamf Raban," apparently a reference to the Totenkopfverbände—"death head units" of Nazi concentration camp guards from 1936 through World War II. The skull and crossbones was the insignia of the Totenkopfverbände. As one would expect, these actions caused members of the congregation great emotional distress and fear.

The complaint alleges that the racial character of defendants' action is established by their perception "of plaintiffs as racially distinct because they are Jews," and the procedural posture of this case requires us to assume that defendants do indeed view Jews as racially distinct. This assumption is further supported by the nature of

the slogans and symbols painted on the synagogue and by the statements of defendants themselves. The paintings found on the synagogue align the defendants with both the Ku Klux Klan and the Nazis, two groups infamous for their persistence in the view that Jews constitute a separate and inferior race. *See infra*, at 17-19. Depositions of defendants reveal that they understood the message of these groups and ascribed to the validity of their racial theories. Defendant Heine, for example, understood that the Nazis wanted to develop a superior race, one distinct from the Jewish race. Defendant Hunt belived that the phrase "Dead Jew" would make a Jew uncomfortable because "[i]t's an insult to your race." Thus, there is no question on appeal that defendants considered Jews to be a racially distinct group.

II.

Without so much as a hint as to the affirmative reach of § 1982, the majority asserts *ipse dixit* that defendants' actions "are not what section 1982 was intended to protect against." *Ante* at 8. This conclusion cannot withstand analysis. Federal civil rights laws protect citizens from acts of discriminatory intent. The discrimination found here is no different in character or consequence from that found in every racial discrimination case. Misperception lies at the heart of prejudice, and the animus formed of such ignorance sows malice and hatred wherever it operates without restriction. By removing the restriction of federal laws, the majority allows racial motivations greater latitude to effect their intolerable aims. There is simply no good reason why we should interpret this statute to protect against some forms of racial animus but not others.

There is, of course, no question that the Civil Rights Act of 1866, the genesis of §§ 1981 and 1982, was aimed at the evil fostered by racially discriminatory animus. Though not intended to provide recovery for discrimina-

tion based on religion, *Runyan v. McCrary*, 427 U.S. 160, 167 (1976); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968), or national origin, *Jones*, 392 U.S. at 413,[2] these sections clearly prohibit "*all* racially motivated deprivations of the rights enumerated in the statute." *Id.* at 426 (emphasis in original). The focus on discriminatory intent is not unique to §§ 1981 and 1982, for the presence of such intent is sufficient to establish violations of other laws aimed at the eradication of racial prejudice. *See, e.g., International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977) (Title VII); *Washington v. Davis*, 426 U.S. 229, 238-42 (1976) (Fifth, Fourteenth Amendments); *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971) (42 U.S.C. § 1985(3)). The effort to eliminate racially motivated actions, moreover, is not to be obstructed by narrow interpretations. The laws at issue here offer protection to "all persons" (§ 1981) and "all citizens" (§ 1982), and "establish[ed] in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves." *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 296 (1976) (holding § 1981 available to whites). Put simply, the laws established the right of every person to be free of enumerated deprivations motivated by racial animus.

The focus on the subjective intent of the actor reflects the reality that discrimination and prejudice is grounded in erroneous perceptions. In the more familiar case, racial discrimination is based on the misperception of the relevance of racial identity. Bigots are motivated by the belief that those of another race are inferior and hence

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[2] The Supreme Court has interpreted § 1981 to prohibit discrimination due to alienage, *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 419-20 (1948), but the extent of this protection is unclear. *See* Note, *National Origin Discrimination Under Section 1981*, 51 Fordham L. Rev. 919, 922-23 & note 28 (1983).

worthy of physical, mental and social repression. *See*, G. Myrdal, *An American Dilemma* 97-106 (1944). Broad, stereotypical assumptions about race have always formed the basis for both private and official acts of prejudice. One would think it preposterous to require that these beliefs be objectively true before federal law provides protection. To the contrary, it is precisely because such beliefs are false and reprehensible that federal civil rights laws were enacted. These laws provide redress for the harms suffered by misperceptions about the relevance of race as a basis for action in our society.

Plaintiffs here were confronted not only with these misperceptions about the relevance of racial identity but also with the misperception that Jews are a distinct and inferior race. The evil visited upon them was thus a dual one. It is, of course, clear to this court, the district court, and counsel that Jews are not, under any legitimate view, a distinct race, but are in fact members of a religious community with a rich cultural heritage. *See* A. Montague, *Man's Most Dangerous Myth: The Fallacy of Race* 353-77 (5th ed. 1974). Yet the majority finds that the misperceptions at work here deprive the claim of the "racial character," *Georgia v. Rachel*, 384 U.S. 780, 791 (1966), necessary to bring it within § 1982. This conclusion must rest upon the view that the racial fallacies here are so different from those routinely prohibited by federal law as to fall outside the scope of it. I fail to see any relevant distinction between the racial attitudes that prompted defendants' actions and those at work in actions clearly within the scope of § 1982.

It is undeniable that the misguided view of the racial distinctiveness of Jews has led to atrocities of no less consequence than those generated by other fallacious beliefs about race. Though history is unfortunately replete with examples of repression of Jews as a people, one need not trace these problems through the ages to discern the consequences of distorted racial views about Jews, for it

is during this century that their most terrible effects have been witnessed. Hitler was driven by the belief that Jews constituted a separate race that threatened his goal of racial purity. *See*, G. Gilbert, *Nuremberg Diary* 43 (1947) (testimony of Julius Streicher). "The fact that the Nazi 'race' theories represented the most ludicrous and vicious mythology that had ever been perpetuated upon a people did not . . . prevent those myths from functioning as if they were perfectly true." A. Montagu, *Man's Most Dangerous Myth*, at 49. History teaches, then, that misperceptions about racial identity are no different in the misery and hatred they spread than misperceptions about the relevance of race.[3]

Nor is the danger of warped racial classification of Jews simply a matter of history. Neo-Nazi groups in the United States make no effort to hide their racist heritage or their ultimate goals. The National Socialist Party of America, for example, has proclaimed among its fundamental principles "acceptance of Adolf Hitler" and "the Jew as the Ultimate Enemy." *The New Order*, March 1979, at 3. These principles are expressed in explicitly racist terms: "The single serious enemy facing the White man is the Jew. The Jews are not a religion, they are an asiatic *race*, locked in mortal conflict with Aryan man which has lasted for millenia, and which will continue until one of the two combat peoples are extinct." *Id.* (em-

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[3] There can be no question that the Nazi theory and practice was racial. "[T]he Nazi attitude and discrimination against the Jews was not founded upon their religious practices; it did not cease upon religious conversion. Indeed, it even manifested itself in hunting down and 're-judaizing' assimilated Christians of Jewish extraction. Nor was this discrimination based upon national origin, since Jews of impeccable German ancestry were equally subject to the atrocities visited upon French, Polish, Danish, and Russian Jews. The Nazi discrimination against Jews was racial in that the Nazis defined the Jews as separate from their 'Aryan' race and maintained that Jews were a physically distinct people." Greenfield & Kates *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 Cal. L. Rev. 662, 677-78 (1975).

phasis in original). A group called Aryan Nations, in a publication of the same name, has implored its readers: "Aryans Awake! Jews are the Race of Satan!" *Aryan Nations*, No. 30 (1979) at 8. The racist view of Jews is also a major tenet of the Ku Klux Klan. An expert on the Klan, in an affidavit prepared for this litigation, noted that "a prevalent belief among the various Ku Klux Klan groups is that Jewish people are racially distinct from whites."

These views, like those of the Nazis, have resulted in numerous instances of violence against Jewish citizens. The facts of this case, unfortunately, are not isolated but instead representative of such incidents. In 1985 alone there were, in the estimate of one organization, 638 incidents of anti-Semitic vandalism against Jewish institutions, private Jewish homes, and Jewish businesses in the United States. Anti-Defamation League of B'nai B'rith, *1985 Annual Audit of Anti-Semitic Incidents* 1 (1986). Anti-Semitic physical assaults against Jews, and anti-Semitic threats and harrassment of Jewish institutions reportedly totaled 306. *Id.* at 2. Even were such events less prevalent, it would not lessen the sufferings of those subjected to them.

Of course, not every wrong against a Jewish citizen would be actionable under the civil rights laws. Here, however, we deal with the adherents of organizations whose aims are avowedly racial. It is clear that this case, like every case of racial discrimination, is the result of racial misperceptions. These misperceptions, moreover, result from the same catalyst for fear and violence that caused Congress to enact the Civil Rights Acts of 1866 and 1871. Defendants appropriate the very symbols of the Ku Klux Klan, the organization that visited the most virulent brand of racial violence in the Reconstruction era. In acting against it, Congress proclaimed the right of "all persons" to be free of "all racially motivated deprivations of the rights enumerated in the statute." *Jones*,

392 U.S. at 426. The majority now denies that right to plaintiffs by allowing defendants' misperceptions and ignorance to serve as a defense to their actions.

III.

The failure to allow this claim under § 1982 is not only inconsistent with the purpose of the statutory scheme, but also saddles the courts with the difficult and inappropriate burden of delineating racial distinctions in a context where they are irrelevant and unnecessary. The majority, apparently fearful that § 1982 actions might rest "entirely on the idiosyncracies of individual defendants," *ante* at 4, rejects the racial nature of the actions here because the victims did not actually belong to the distinct racial class in which defendants placed them. This approach, I presume, requires courts to determine by some more objective criteria whether an individual is a member of a distinct race before the Civil Rights Act of 1866 may apply. Yet the majority offers little guidance about how courts should undertake the troubling task it requires. Careful consideration of the burden imposed by the majority reveals significant deficiencies in the approach it establishes.

It is unrealistic to expect that a biological or anthropological perspective on the question of race will help courts to determine those protected under the majority's approach. The scientific concept of "race" is anything but definite. As one court has noted, scientists generally agree that "[t]he notion of race is a taxonomic device [that] exists in the human mind and not as a division in the objective universe." *Ortiz v. Bank of America*, 547 F. Supp. 550, 565 (E.D.Cal. 1982). *See* M. Banton & J. Harwood, *The Race Concept* 43-60 (1975); F. Livingstone, *On the Nonexistence of Human Races* in *The Concept of Race* (A. Montagu, ed. 1964). Scientists engaged in racial classification recognize that the choice of characteristics used to determine racial groups is arbitrary

and depends upon the reason for classification rather than objective reality. *See, Ortiz*, 547 F.Supp. at 565-66 and sources cited; Lundsgaarde, *Racial and Ethnic Classifications: An Appraisal of the Role of Anthropology in the Lawmaking Process*, 10 Hous. L. Rev. 641, 648-49 and note 23 (1973). Moreover, racial classifications are dynamic and subject to constant re-examination. *See* A. Montagu, *Statement on Race* 46-50 (3d ed. 1972). In short, the inexact and unstable nature of scientific racial classification makes the tool all too treacherous for a court seeking to determine the precise coverage of federal law.

More significantly, the scientific debate over the meaning of race is simply irrelevant to the determination of the protection of a statute addressed to a social phenomenon. As this case demonstrates, it is not scientifically authenticated views but rather distorted social perceptions that lie at the root of racial violence. "The social definition and not the biological facts actually determines the status of an individual and his place in interracial relations. . . . [T]he scientific concept of race is *totally inapplicable at the very spots where we recognize 'race problems.'*" G. Myrdal, *supra*, at 115. (emphasis in original). We cannot be blind to the fact that "[t]o most people, a race is any group of people whom they choose to describe as a race." UNESCO, *Statement on Race* (1950) in A. Montagu, *Statement on Race* at 8. In construing statutes designed to eliminate racial prejudice, we must confront the reality that the perceptions of individuals, rather than the measurements of science, define the scope of racial discrimination. To limit § 1982 to discrimination against scientifically established racial groups would deprive the remedy of its force in an artificial and disingenuous manner.

Perhaps in recognition of the inadequacies of a scientific approach to the scope of § 1982, several courts have employed a "common perception" test to determine the coverage of the statute. *See, e.g., Ramos v. Flagship*

International, Inc., 612 F.Supp. 148, 151 (E.D.N.Y. 1985); *Banker v. Time Chemical, Inc.*, 579 F.Supp. 1183, 1186 (N.D.Ill. 1983); *Budinsky v. Corning Glass Works*, 425 F.Supp. 786, 788 (W.D. Pa. 1977). The majority implies that § 1982 might apply here if the misperception at work were a common or widely-shared view, but rejects the application of this test because "the position of Jews in this society [is not] analogous to that of Mexican-Americans or others commonly considered to be non-white." *Ante* at 8. Thus, while recognizing the role of misperceptions in racial discrimination, the majority apparently requires that they be broadly held for § 1982 to apply. There are several reasons why any such approach must be rejected on these facts.

First, the majority's assertion of the common perception of Jews is totally unsupported. The level and persistence of racial violence against Jews, as discussed above, certainly suggests that the misperceptions here are shared by too sizeable a number of individuals. One anthropologist has observed that "Jews are nearly always referred to in popular parlance as a 'race.' This is done not only by the so-called 'man in the street' but also by many scientists, medical men, philosophers, politicians, historians, and the members of many other professions." A. Montagu, *Man's Most Dangerous Myth*, at 353 (footnote omitted). Thus, there exists a real question about the breadth of the views at work in this case. If the majority insists that misperceptions be broad based for § 1982 to apply, plaintiffs should at least be given the opportunity to show the scope of the belief that they are members of a distinct race.

In any event, the scope and breadth of illegitimate views is not controlling where, as here, plaintiffs seek to demonstrate that these particular defendants held, and were motivated by, racial misperceptions. The very purpose of the Civil Rights Acts was to ensure that the most bigoted people are not permitted to translate their im-

pulses into tangible harms. Protection against the acts of racial prejudice is necessary whether the views are widely held or idiosyncratic. Where, as here, plaintiffs are prepared to show defendants were motivated by racial beliefs, however misguided, there is no reason for a court to require more. Many courts have recognized that proof of racial motivation, without more, is sufficient to bring an action within § 1981 or § 1982. *See, e.g., Khawaja v. Wyatt*, 494 F.Supp. 302, 304 (W.D.N.Y. 1980); *Apodaca v. General Electric Co.*, 445 F.Supp. 821, 823-24 (D.N.M. 1978). The fact that courts may sometimes find it convenient to look to common perceptions to determine racial status should not preclude plaintiffs from showing that defendants here operated on the basis of racial misperceptions, however, misguided or idiosyncratic.

Permitting the subjective belief of defendants to give a claim the "racial character" necessary to bring it within the civil rights statutes thus not only ensures adequate coverage but also avoids in many cases the difficult and troubling task of drawing racial lines. Even if courts were well equipped to make racial determinations without engaging in "precisely the kind of stereotyping which the civil rights statutes were designed to prevent," *Khawaja*, 494 F.Supp. at 305 n.1, the undertaking presents a potential for continued harm and prejudice so great that it should be avoided wherever possible. It is an understatement to note that attempts to place individuals in distinct racial groups frequently serve only to facilitate continued discrimination and postpone the day when all individuals will be addressed as such. It is regrettable that the majority has adopted an approach that demands judicial draftsmanship of an officially recognized and protected list of races.[4] It is doubly regret-

[4] It is only the majority's approach that establishes a need for racial distinctions here. In *McDonald v. Santa Fe Trial Transportation Co.*, 427 U.S. 273, 295 (1976), the Supreme Court examined the legislative history of the Civil Rights Act of 1866 and rejected

table that it adopts this approach in a case where the racial nature of the acts is clear and compelling.

IV.

Finally, it simply will not do to say that plaintiffs are limited to some unidentified state law remedy. The assertion that this controversy "belong[s] in the state courts," *ante* at 12, begs the question of whether federal law contemplates protection here. Moreover, exclusive reliance on state remedies is particularly inapposite in the context of civil rights, a persistent concern of federal legislation. In enacting the Civil Rights Act of 1866, Congress intended at the very least to supplement state laws. *See Jones*, 392 U.S. at 426-36. The Civil Rights Act of 1871, also known as the Ku Klux Klan Act, was designed precisely to provide a federal remedy for activities such as those found in this case. *See, Griffin v. Breckenridge*, 403 U.S. 88 (1971). To now relegate these matters exclusively to state law simply disregards the nature and scope of federal remedies provided by Congress and the unique capacity of federal law to voice a strong and uniform commitment to the eradication of discrimination in our midst.

V.

I would thus reverse the judgment of the district court and find plaintiffs' complaint sufficient to state a cause of action under §§ 1982 and 1985(3). Section 1982 guarantees "all citizens of the United States" an equal right "to hold . . . real and personal property." Section 1985(3) protects them against racially motivated conspiracies to deprive them of the equal protection of federal laws.

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the view that the act applied only to nonwhites. There is thus no need to draw racial lines to determine those who are potential beneficiaries of the protection offered by § 1982. This task is imposed only by the majority's requirement that plaintiffs demonstrate the reality of the racial class in which defendants place them.

As the property, indeed the place of worship, of this community was desecrated for reasons and with symbols that resorted unabashedly to race, I would hold the congregation of Shaare Tefila Synagogue entitled to the protection of our civil rights laws. To do otherwise is to blind ourselves as a nation to the real nature of race prejudice, and to leave American citizens open to the depredations of racial violence—the very acts against which Congress more than a century ago had sought to protect them.

APPENDIX B

IN THE UNITED STATES OF AMERICA FOR THE DISTRICT OF MARYLAND

Civil Action No. R-84-880

SHAARE TEFILA CONGREGATION, *et al.*,
Plaintiffs

v.

JOHN WILLIAM COBB, *et al.*,
Defendants

MEMORANDUM AND ORDER

The Shaare Tefila Congregation, individually and on behalf of its members, instituted this civil action against eight defendants for alleged violations of federal and state law arising from defendants' desecration of plaintiffs' synagogue. Plaintiffs base their claims on federal civil rights statutes 42 U.S.C. §§ 1981, 1982 and 1985 (3), and on Maryland common law of trespass, nuisance and intentional infliction of emotional distress.

Presently pending before the Court is defendant Michael David Remer's motion to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(1) and (6). Plaintiffs filed a response in opposition to the motion and defendant has replied thereto.[1] Oral argument is unnecessary and the Court rules pursuant to Local Rule 6 (D. Md. 1984).

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[1] Plaintiffs in their opposition submit materials outside the pleadings (affidavits and deposition transcripts) and thereby subject the motion to treatment as one for summary judgment. Fed.R. Civ.P. 12(b). Given that extra-pleading materials are inappropriate in a motion based, as this one is in part, on Rule 12(b)(1), and

The grant of a motion to dismiss pursuant to Rule 12 (b) (6) is appropriate only when it appears beyond doubt that plaintiffs can prove no set of facts in support of their claims which would entitle them to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In ruling upon the pending motions to dismiss, the Court must view the complaint in the light most favorable to plaintiffs and resolve every doubt in their behalf. *See* Wright and Miller, *Federal Practice and Procedure: Civil § 1357* (1969) and cases cited therein. The plaintiffs' allegations are to be taken as true for the purposes of ruling upon the motion. *See id.* and cases cited therein. *See also Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969). Moreover, any inference that may reasonably be drawn or construed from plaintiffs' complaint shall be considered together with the allegations of fact. *Murray v. City of Milford, Connecticut*, 380 F.2d 468, 470 (2d Cir. 1967); *L.S. Good & Co. v. H. Daraff & Sons, Inc.*, 263 F.Supp. 635, 644 (N.D. W.Va. 1967).

A motion to dismiss pursuant to Fed.R.Civ.P. 12(b) (1) raises the question of whether a court has subject matter jurisdiction over a proceeding. In ruling upon this motion, the complaint will be construed broadly and liberally, in conformity with Federal Rule of Civil Procedure 8(f). *See, e.g., Bachowski v. Brennan*, 502 F.2d 79, 83 n. 4 (3d Cir. 1974), *rev'd on other grounds sub nom., Dunlop v. Bachowski*, 421 U.S. 560 (1975); *Duffield v. Memorial Hospital Ass'n of Charleston*, 361 F.Supp. 398, 400 (S.D. W.Va. 1973), *aff'd on other grounds sub nom., Duffield v. Charleston Area Medical Center*, 503 F.2d 512 (4th Cir. 1974). *See generally* Wright & Miller, *Federal Practice and Procedure*: Civil § 1350 (1969) and cases cited therein. Where the com-

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finding that the materials submitted will not facilitate the disposition of this action, the Court elects to exclude the materials and consider the motion as one for dismissal. *See* Wright & Miller, *Federal Practice and Procedure:* Civil § 1366 (1969).

plaint's jurisdictional allegations are complete, uncontradicted, and sufficient, the Court ordinarily must overrule a motion directed only at the language of the complaint. *See, e.g., Seaboard Finance Co. v. Martin*, 244 F.2d 329 (5th Cir. 1957). However, the pleading will be read as a whole, with any relevant specific allegations found in the body of the complaint taking precedence over the formal jurisdictional allegation therein, and all uncontroverted factual allegations will be accepted as true. *See, e.g., Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Gibbs v. Buck*, 307 U.S. 66 (1939). The plaintiff ordinarily bears the burden of proof on a Rule 12(b)(1) motion. *See, e.g., Thomson v. Gaskill*, 315 U.S. 442 (1942); *Gibbs v. Buck*, 307 U.S. 66 (1939); *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936). Where the complaint's invocation of subject matter jurisdiction is based on a federal question, the plaintiff need only show that he had alleged a claim under federal law and that the claim is not frivolous. *See, e.g., Baker v. Carr*, 369 U.S. 186 (1962); *Bell v. Hood*, 327 U.S. 678 (1946). The Court must weigh the merits of what is presented in a Rule 12(b)(1) motion. *See Peterson Systems, Inc. v. Morgan*, 224 F.Supp. 957 (W.D. Pa. 1963).

Count I: 42 U.S.C. § 1981

The first count of the complaint alleges that the desecration of plaintiffs' synagogue deprived the congregation of the full and equal benefit of laws for the security of persons and property under 42 U.S.C. § 1981. That statute provides in pertinent part as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . .

Plaintiffs further allege in Count I that the defendants' conduct was "motivated by racial prejudice in that the defendants perceive plaintiffs as racially distinct because they are Jews . . ."

Defendant raises two arguments in support of dismissal of Count I. First, he contends that despite the allegations of racial animus in the pleadings, the essence of plaintiffs' claim is religious rather than racial discrimination, and as such it is not cognizable under § 1981. Second, defendant contends that state action is a required element of any claim under the full and equal benefit clause of the statute; because state action has not been alleged here dismissal is appropriate. The Court finds dismissal appropriate on the ground of state action, and therefore does not reach defendant's first argument for the purposes of Count I.[2]

Plaintiffs do not assert that any state action is involved in the instant case. Rather, they contend that state action is not required for a claim under the full and equal benefits clause, relying on *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). The Supreme Court held in *Jones* that 42 U.S.C. § 1982 was intended to prohibit private acts of discrimination which violate property rights. Plaintiffs argue that the same principles relied upon in *Jones* have been and should in this instance be applied to the full and equal benefits clause of § 1981.

The *Jones* holding has been applied to interpret the contract clause of § 1981 as prohibiting private acts of discrimination. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975); *Runyon v. McCrary*, 427 U.S. 160 (1976). Some courts have indeed extended the holding even further to find, as plaintiffs' urge here, that the full and equal benefit clause of § 1981 also prohibits private acts of discrimination. *See, e.g., Central Presby-*

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[2] Defendant raises a similar argument concerning the true nature of plaintiffs' claim in relation to Count II of the complaint. *See infra.*

terian Church v. Black Liberation Front, 303 F.Supp. 894, 901 (E.D. Mo. 1969). This is by no means a universal interpretation, however. Other courts have noted a distinction between the contract and full and equal benefit clauses of § 1981, finding the concept of state action to be implicit in the latter:

> The words 'full and equal benefit of all laws and proceedings for the security of persons and property' . . . suggests a concern with relations between the individual and the state, not between two individuals. The state, not the individual, is the sole source of law, and it is only the state acting through its agents, not the private individual, which is capable of denying to blacks the full and equal benefit of the law. Thus, while private discrimination may be implicated by the contract clause of section 1981, the concept of state action is implicit in the equal benefit clause.

Mahone v. Waddle, 564 F.2d 1018, 1029 (3rd Cir. 1977), *cert. denied*, 438 U.S. 904 (1979).

The Third Circuit's interpretation of the full and equal benefits clause in *Mahone* was recently adopted by the U.S. District Court for the Eastern District of Virginia. In *Eggleston v. Prince Edward Volunteer Rescue Squad, Inc.*, 569 F.Supp. 1344 (E.D. Va. 1983), *aff'd*, 742 F.2d 1448 (4th Cir. 1984), the court granted summary judgment against the plaintiff's § 1981 action based on expulsion from a private rescue squad, finding no basis for a claim under the contract clause and no state action to support a claim under the full and equal benefit clause. 569 F.Supp. at 1353. This Court is in full agreement with the reasoning expressed in *Mahone* and adopted in *Eggleston* which distinguishes between the contract and equal benefit clauses for the purposes of state action. In the instant case there does not exist, nor do plaintiffs assert, any basis for a claim under the contract clause. Nor does there exist, and plaintiffs again do not assert, state action to support a claim under the full and equal benefit

clause. Dismissal is accordingly proper as to Count I of the complaint

Count II: 42 U.S.C. § 1982

The second count of the complaint alleges that defendants' desecration of the synagogue deprived plaintiffs of the right to hold real and personal property in violation of 42 U.S.C. § 1982. That statute provides as follows:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Plaintiffs again specifically allege in this Count that the defendants' conduct was "motivated by racial prejudice in that defendants perceive plaintiffs as racially distinct because they are Jews."

Defendants argue in support of dismissal of Count II that despite the "pleading artifice" by which plaintiffs attempt to assert race discrimination as the basis for their claim, the claim is nevertheless one of religious discrimination to which § 1982 does not apply. Plaintiffs argue in response that by specifically alleging that defendants' acts were motivated by racial animus they have in fact stated a claim for race discrimination cognizable under § 1982.

42 U.S.C. § 1982, along with § 1981, had its origin in the first section of the Civil Rights Act of 1866. *Tillman v. Wheaton-Haven Recreation Association*, 410 U.S. 431, 439 (1973). That Act was intended to protect a "limited category of rights, specifically defined in terms of racial equality." *Georgia v. Rachel*, 384 U.S. 780, 791 (1965). Not surprisingly, then, § 1982 has been held to apply solely to racial rather than to other types of discrimination. *Jones v. Alfred H. Mayer Co., supra* at 413 (1967). Moreover, the Supreme Court has specifically noted that the statute does not address itself to discrimination based on religion. *Id.*

Plaintiffs in defending their cause of action under § 1982 do not argue for a broad interpretation of the statute such as would protect against discrimination based on religion. Nor do they ask for judicial recognition of a Jewish racial identity in order that the statute be applicable here. Rather, plaintiffs argue that race discrimination for the purposes of § 1982 should be determined by the subjective perceptions of the discriminator: whatever the reality may be, because it is alleged that the defendants in this case *perceive* Jews to be a separate race and were motivated by racial animus, a viable cause of action exists.

The Court is unwilling to adopt an interpretation which relies so entirely on the idiosyncracies of individual defendants in civil rights cases. As defendant notes, such an approach would have the practical effect of extending § 1981 and § 1982 to apply to any group, however defined, merely by virtue of alleging that an individual defendant perceived the group as racially inferior, however irrational that perception might be. Moreover, the suggested approach is at odds with the language of decisions in this district concerning the scope of § 1981, which is clearly applicable to § 1982 as well. In *Martinez v. Hazelton Research Animals*, 430 F.Supp. 186 (D. Md. 1977), Judge Murray in deciding whether a discrimination claim by a Hispanic stated a proper cause of action under § 1981 specifically noted that some Hispanic individuals "may suffer discrimination closely akin to that experienced by members of the black race," but found that the plaintiff had not "sufficiently alleged racial background of the plaintiff in order to support an allegation of racial discrimination" under the statute. *Id.* at 187-88. Clearly it was the "racial background of the plaintiff" rather than the racial perceptions of the defendant, that the court found determinative. Judge Miller in *Lopez v. Sears, Roebuck and Co.*, 493 F.Supp. 801 (D. Md. 1980) adopted the above language from *Martinez* but found that in his case the plaintiff had "clearly stated that the

alleged discrimination is based both on nationality (Hispanic) and race (brown)." 493 F.Supp. at 807. Again, it is, to use Judge Murray's term, the "racial background" of the plaintiff ("race (brown)") that was found to support a cause of action under the statute. Applying this principle to the instant case, the Court finds that plaintiffs' allegation that defendants perceive them as racially distinct fails to establish a cause of action under § 1982.

The Court is sympathetic to plaintiffs' outrage and sorrow over the desecration of their place of worship, and recognizes the history of discrimination against Jews which is so eloquently described in plaintiffs' brief. Nevertheless, as plaintiffs themselves affirm, Jews do not constitute a distinct or recognizable "race" and are not commonly identified as such. Distorted beliefs of certain deviant groups to the contrary, the Court holds that discrimination against Jews is not race discrimination within the meaning of the statutes in question. *See Budinsky v. Corning Glass Works*, 425 F.Supp. 789 (W.D. Pa. 1977) (persons of Slavic, Italian or Jewish origin "are not so commonly identified as 'races' nor so frequently subject to that 'racial' discrimination which is the specific and exclusive target of § 1981"); *Wald v. International Brotherhood of Teamsters*, 24 FEP Cases 616, 619 (C.D. Ca. 1980) "[T]he weight of authority supports the view that claims of discrimination against Jews do not state claims under § 1981"). *But see Marlowe v. Fisher Body Division*, 11 FEP Cases 1357 (C.D. Mich. 1975) (in certain contexts discrimination against Jewish persons could be the equivalent of race discrimination under § 1981).

Count III: 42 U.S.C. § 1985(3):

The third count of the complaint alleges that in violation of 42 U.S.C. § 1985(3) the defendants conspired to deprive plaintiffs of equal protection of the laws or of equal privileges and immunities under the laws, including but not limited to the right to travel, the right to assemble and worship, and rights protected by 42 U.S.C.

§ 1981 and § 1982, Maryland criminal laws against destruction of proper[illegible]d Maryland common law against trespass, nuisance and intentional infliction of emotional distress. In view of the Court's dismissal of Counts I and II, the claim of conspiracy to deprive plaintiffs of rights under 42 U.S.C. § 1981 and § 1982 must also be dismissed. In addition, plaintiffs no longer assert the right to assemble and worship as an element of Count III, apparently conceding that a claim under § 1985(3) as applied to First Amendment rights fails in the absence of state action. *United Brotherhood of Carpenters and Joiners of America, Local 610 v. Scott*, —— U.S. ——, 77 L.Ed.2d 1049 (July 1983). The Court will accordingly consider plaintiffs' § 1985 claim only as it applies to the federal right to travel and the various state rights plaintiff has asserted.

Right to Travel:

Nowhere in the complaint do plaintiffs make specific factual allegations that defendants interfered with their right to travel. Plaintiffs argue, however, that from their allegations as to the location of the synagogue and its members, the conduct of the defendants and the effect of that conduct on plaintiffs the finder of fact could conclude that the purpose and effect of the conspiracy was infringement of interstate travel. The Court finds this argument much too attenuated to support a cause of action under § 1985(3).

Certainly plaintiffs' conclusory allegation in Count III that defendants conspired for the purpose of depriving plaintiffs of their federal constitutional right to travel is insufficient to state a cause of action under § 1985. *Greene v. JHU*, 469 F.Supp. 187, 198 (D.Md. 1979). Nor does the sum of the other allegations specified by plaintiffs support such a claim. The Court finds this case to be easily distinguished from *Griffin v. Breckenridge*, 403 U.S. 88 (1971), upon which plaintiffs rely. In *Griffin* the

Supreme Court reversed an order dismissing a § 1985 complaint, on the ground that under the allegations presented it was open to the plaintiffs to prove at trial that defendants conspired to deprive them of their right to travel. The complaint in *Griffin* specifically alleged that plaintiffs were traveling upon federal, state and local highways in and about several counties, one of which was located on a state border; that defendants conspired to block plaintiffs' passage on those public highways and that pursuant to the conspiracy defendants in fact drove into the path of plaintiffs' vehicle and physically blocked its passage. In the instant case, by contrast, plaintiffs fail to allege any actual interference with their right to travel. Nor is there any support in the pleadings for the inference that defendants conspired to interfere with this right. Plaintiffs' claim under § 1985(3) is accordingly dismissed insofar as it concerns plaintiffs' right to travel.

Rights Under Maryland Law:

Plaintiffs argue that state as well as federal rights are protected under § 1985(3), citing *Life Insurance Co. of North America v. Reichardt*, 591 F.2d 499 (9th Cir. 1979). The Court is persuaded, however, that the statute is properly interpreted to reach only federal constitutional and statutory rights. Subsequent to the Ninth Circuit's holding in *Reichardt* the Supreme Court described § 1985(3) as "providing a civil cause action when some otherwise defined *federal* right . . . is breached by a conspiracy . . .". *Great American Federal Savings and Loan v. Navotny*, 442 U.S. 366, 376 (1979) (emphasis added). The limitation of § 1985(3) to rights guaranteed by federal law or the Constitution has been clearly asserted by the Fourth Circuit as well. *McNutt v. Duke Precision Dental and Orthodontic Labs, Inc.*, 698 F.2d 676, 680 (4th Cir. 1983). Accordingly, the claim under § 1985(3) must be dismissed insofar as it concerns the various state rights asserted.

Plaintiffs have failed to state a cause of action on any of the purported bases under § 1985(3). Count III of the complaint must accordingly be dismissed.

Counts IV-VI: State Law Claims

The remaining counts of the complaint allege violations of Maryland statutory and common law. Given the Court's dismissal of all federal claims, the pendent state claims must also be dismissed. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

Although the motion to dismiss was filed on behalf of only one defendant it is obvious from the rulings contained herein that dismissal is appropriate as to the entire case against all defendants. Accordingly, for the reasons stated herein, it is this 22nd day of April, 1985, by the United States District Court for the District of Maryland,

ORDERED:

1. That defendant Remer's motion to dismiss is GRANTED; and,

2. That the action is DISMISSED as to all defendants; and,

3. That the Clerk of the Court shall mail copies of this Memorandum and Order to all counsel of record.

/s/ Norman P. Ramsey
NORMAN P. RAMSEY
United States District Judge

IN THE UNITED STATES OF AMERICA
FOR THE DISTRICT OF MARYLAND

Civil Action No. R-84-880

SHAARE TEFILA CONGREGATION, *et al.*,
Plaintiffs

v.

JOHN WILLIAM COBB, *et al.*,
Defendants

JUDGMENT

In accordance with the Memorandum and Order dated April 22nd, 1985, and filed in the above entitled case, it is

ORDERED and ADJUDGED:

That judgment is hereby entered in favor of the defendants and against the plaintiff.

/s/ Norman P. Ramsey
NORMAN P. RAMSEY
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

March 7, 1986

TO: William A. Bradford, Jr., Esq.
Patricia A. Brannan, Esq.
Daniel S. Cohen, Esq.
Steven P. Hollman, Esq.
P. Dustin Finney, Jr., Esq.
Paul W. Nolan, Esq.
Robert Barnhouse, Esq.
Deborah T. Garren, Esq.
Irvin N. Shapell, Esq.
Harold F. Golding, Esq.
Joseph M. Niland, Esq.

NOTICE OF JUDGMENT

Judgment was entered in Case No. 85-1544 this date.

The Court's opinion is enclosed.

Petition for Rehearing (FRAP 40)

Filing Time

A petition must be *received in the Clerk's Office* within 14 days after the judgment date set forth above. *No extension will be granted save for the most compelling reasons.* Requests based on grounds such as miscalculation of time or a need to consult with others will be peremptorily denied.

Purpose

A petition should only be made to direct the Court's attention to one or more of the following situations:

1. A material fact or law overlooked in the decision.

2. A change in the law which occurred after the case was submitted and which was overlooked by the panel.

3. An apparent conflict with another decision of the Court which is not addressed in the opinion.

Statement of Counsel

A petition shall contain an introduction stating that, in counsel's judgment, one or more of the situations exist as described in the above "Purpose" section. The points to be raised shall be succinctly listed in the statement. Lacking such a statement, the petition will be returned to counsel without filing.

Form

The 15 page limit allowed by the Rule shall be observed. The Court requires 15 copies of the petition; however, a pro se party who is indigent may file the original only.

Bill of Costs (FRAP 39)

Filing Time

A party to whom costs are allowed, who desires taxation of costs, shall file a bill of costs within 14 days after judgment.

Mandate (FRAP 41)

Issuance Time

The mandate is issued 21 days after judgment. A *timely* petition for rehearing will stay the issuance. If the petition is denied, the mandate will issue 7 days later. If a stay of mandate is sought, only the original of a motion need be filed.

Stay

A motion for stay of the issuance of the mandate shall not be granted simply upon request. Ordinarily the motion will be denied unless it would not be frivolous or filed merely for delay and would present a substantial question or otherwise set forth good or probable cause for a stay.

JOHN M. GREACEN
Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. R-84-880

SHAARE TEFILA CONGREGATION,
11120 Lockwood Drive
Silver Spring, Maryland 20901
INDIVIDUALLY AND ON BEHALF OF ITS MEMBERS

and

RABBI MARTIN S. HALPERN
Shaare Tefila Congregation
11120 Lockwood Drive
Silver Spring, Maryland 20901

and

SHIRLEY ALTMAN
10806 Wheeler Drive
Silver Spring, Maryland 20901

and

WILLIAM HARKAWAY
1010 Nora Drive
Silver Spring, Maryland 20904

and

MARSHALL S. LEVIN
Shaare Tefila Congregation
11120 Lockwood Drive
Silver Spring, Maryland 20901

and

MAURICE POTOSKY
3505 Beret Lane
Silver Spring, Maryland 20906

and

DR. JACOB TELLER
1401 Chilton Drive
Silver Spring, Maryland 20904,
Plaintiffs,

v.

JOHN WILLIAM COBB
9316 Piney Branch Road
Apartment 102
Silver Spring, Maryland 20903

and

WILLIAM RANDALL HARRIS
11700 Old Columbia Pike
Apartment 107
Silver Spring, Maryland 20904

and

THOMAS LLOYD HEINE
11612 Stewart Lane
Apartment 402
Silver Spring, Maryland 20904

and

WILLIAM HESS
(current residence address unknown)

and

THOMAS JOSEPH HUNT, JR.
11311 Old Columbia Pike
Apartment B-8
Silver Spring, Maryland 20904

and

RAYMOND LEE JORDAN
11416 Stewart Lane
Apartment B-1
Silver Spring, Maryland 20904

and

DOMINIC QUEEN
12919 Broadmore Road
Silver Spring, Maryland 20904

and

MICHAEL DAVID REMER
10506 Hutting Place
Wheaton, Maryland 20902,
Defendants.

Complaint

1. This class action is brought for declaratory and injunctive relief and damages for violations of the federal civil rights acts, 42 U.S.C. §§ 1981, 1982, and 1985(3), and for violations of Maryland common law. This action is brought to redress the injury caused by defendants' conspiracy to desecrate and their desecration of the synagogue of the Shaare Tefila Congregation in Silver Spring, Maryland.

2. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331, 1343(a)(1) and (4); 28 U.S.C. §§ 2201 and 2202; and principles of pendent jurisdiction.

The Parties

3. Shaare Tefila Congregation ("the Congregation") is a Jewish community of approximately 500 member families which is organized as a non-stock, membership religious corporation under the laws of the State of Maryland. The Congregation assembles for the purpose of worship and other community activities. Members of

Shaare Tefila Congregation reside in Maryland and the District of Columbia. The Congregation holds title to real property at 11120 Lockwood Drive, Silver Spring, Maryland, and owns a synagogue at that address.

4. Plaintiffs Shirley Altman, William Harkaway, Maurice Potosky, and Dr. Jacob Teller are citizens of the United States and residents of the State of Maryland. They are members of Shaare Tefila Congregation.

5. Plaintiffs Rabbi Martin S. Halpern and Marshall S. Levin are citizens of the United States and residents of the State of Maryland. They are employees of Shaare Tefila Congregation.

6. Plaintiffs sue on their own behalf and on behalf of the members and employees of Shaare Tefila Congregation.

7. Defendants John William Cobb, William Randall Harris, Thomas Lloyd Heine, William Hess, Thomas Joseph Hunt, Jr., Raymond Lee Jordan, Dominic Maurice Queen, and Michael David Remer are citizens of the United States and residents of Maryland.

Class Action Allegations

8. Plaintiffs bring this action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of themselves and the class of members and employees of Shaare Tefila Congregation.

9. The class described in paragraph 8 is so numerous, at approximately 500 family member units and 40 employees, that joinder of all its members is impracticable. There are questions of law or fact common to the class: proof of the conduct of the defendants in desecrating the synagogue is a common factual issue and establishing the unlawfulness of defendants' conduct is a common legal issue to the class. The claims of the representative parties are typical of the claims of the class. The repre-

sentative parties will fairly and adequately protect the interests of the class. Defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Factual Statement

10. On the evening of November 1, 1982, defendants met behind the Drug Fair at White Oak Shopping Center in Silver Spring, Maryland. Defendants conspired to and some or all of the defendants spray-painted words and symbols on the outside wall of the Drug Fair, including a burning cross, the slogans "White Power" and "Aryan Brotherhood," the initials "KKK," an eagle with a swastika, a Star of David with an arrow through it, and initials of the defendants.

11. Defendants conspired at the Drug Fair to deface and desecrate the synagogue of Shaare Tefila Congregation. In furtherance of that conspiracy, they left the Drug Fair as a group and went to Shaare Tefila Congregation. On the way to the synagogue, some or all of the defendants painted a swastika on a car owned by plaintiff Jacob Teller, which was parked in front of the synagogue. Defendants acted willfully and wantonly in painting Dr. Teller's car.

12. Defendants entered the property of Shaare Tefila Congregation without permission or acquiescence of the Congregation or any of its members. Defendants conspired to and some or all of the defendants painted words and symbols on the outside walls of the synagogue owned by Shaare Tefila Congregation, including swastikas, a skull and cross-bones, a burning cross, and the slogans "Toten Kamf Raban," "Dead Jew," "Death to the Jude," "Ku Klux Klan" and "In, Take a Shower Jew." Defendants acted willfully and wantonly in defacing the synagogue and, by reason of their conspiracy and conduct, all are responsible.

13. The words and symbols painted on the synagogue by defendants vividly evoke the horrors of the Holocaust and the systematic killing of over 6 million Jews. The defendants' conduct in painting these words and symbols was shocking and horrifying. Defendants' intent to injure, harass and intimidate the members of the Congregation because they are Jews is shown by, *inter alia*, the virulently anti-Semitic nature of the words and symbols they painted.

14. Members of the Congregation suffered great emotional distress as well as fear for the safety of the Congregation and of its synagogue upon learning of the desecration of the synagogue.

15. Defendants defaced the synagogue with indelible paint which could not be completely removed by washing the walls. The Congregation had to repaint the defaced walls to cover the anti-Semitic words and symbols painted by the defendants.

16. On June 15, 1983, a jury in the Circuit Court for Montgomery County, Maryland convicted defendant Michael David Remer of conspiracy to commit malicious destruction of property and destruction of property for the desecration of the synagogue of Shaare Tefila Congregation.

17. On April 26, 1983, defendant William Randall Harris pleaded guilty in the Circuit Court for Montgomery County to conspiracy to commit malicious destruction of property for the desecration of the synagogue of Shaare Tefila Congregation.

Count I—42 U.S.C. § 1981

18. Plaintiffs reallege and incorporate herein by reference the allegations in paragraphs 1 through 17.

19. Defendants' desecration of the synagogue of Shaare Tefila Congregation deprived plaintiffs of the full and equal benefit of laws for the security of persons and property. Defendants' desecration of the synagogue was motivated by racial prejudice in that defendants perceive

plaintiffs as racially distinct because they are Jews, all in violation of 42 U.S.C. § 1981.

Count II—42 U.S.C. § 1982

20. Plaintiffs reallege and incorporate herein by reference the allegations in paragraphs 1 through 19.

21. Defendants' desecration of the synagogue of Shaare Tefila Congregation deprived plaintiffs of the right to hold real and personal property. Defendants' desecration of the synagogue was motivated by racial prejudice in that defendants perceive plaintiffs as racially distinct because they are Jews, all in violation of 42 U.S.C. § 1982.

Count III—42 U.S.C. § 1985(3)

22. Plaintiffs reallege and incorporate herein by reference the allegations in paragraphs 1 through 21.

23. By conspiring to and desecrating the synagogue of Shaare Tefila Congregation, defendants conspired for the purpose of depriving, either directly or indirectly, the class of members of Shaare Tefila Congregation of the equal protection of the laws or of equal privileges and immunities under the laws, including, but not limited to, plaintiffs' federal constitutional right to travel, 42 U.S.C. §§ 1981 and 1982, plaintiffs' right to assemble and worship, Maryland criminal laws prohibiting destruction of property and conspiracy to destroy property, and Maryland common law prohibiting trespass, nuisance and intentional infliction of emotional distress.

24. Defendants committed acts in furtherance of the conspiracy, including coming onto the property of the Congregation without acquiescence or consent and defacing the synagogue, thereby injuring plaintiffs in their persons and property.

25. Defendants were motivated by an invidiously discriminatory animus to injure plaintiffs because plaintiffs are Jews, all in violation of 42 U.S.C. § 1985(3).

Count IV—Pendent State Claim for Trespass

26. Plaintiffs reallege and incorporate herein by reference the allegations in paragraphs 1 through 25.

27. Defendants unlawfully entered upon land owned by and in the possession of Shaare Tefila Congregation, without the permission or acquiescence of the Congregation or its members. Defendants caused damage to the synagogue of the Congregation and injury, mental pain and suffering to plaintiffs, all in violation of the common law of Maryland.

Count V—Pendent State Claim for Nuisance

28. Plaintiffs reallege and incorporate herein by reference the allegations in paragraphs 1 through 27.

29. By defendants' desecration of the synagogue, they caused damage to the synagogue of the Congregation and injury, mental pain and suffering to plaintiffs in their legitimate enjoyment of their reasonable rights in the property owned by Shaare Tefila Congregation, all in violation of the common law of Maryland.

Count VI—Pendent State Claim for Intentional Infliction of Emotional Distress

30. Plaintiffs reallege and incorporate herein by reference the allegations in paragraphs 1 through 29.

31. Defendants caused severe mental and emotional distress to the individual named plaintiffs and the class of members of Shaare Tefila Congregation by their intentional, extreme and outrageous acts alleged herein, all in violation of the common law of Maryland.

Prayer

WHEREFORE, Plaintiffs pray that this Court:

a) Declare that defendants' conduct alleged herein violated plaintiffs' rights protected by 42 U.S.C. §§ 1981, 1982 and 1985(3), and Maryland common law;

b) Hold that plaintiffs' remedies at law are inadequate to prevent or deter future violations of their rights as alleged herein, and permanently enjoin defendants, and all others in active concert or participation with them who receive notice of the Court's Order, from harassing, threatening, insulting, or intimidating plaintiffs or other Jewish persons or organizations in the Washington metropolitan area; trespassing on plaintiffs' property or the property of other Jewish persons or organizations in the Washington metropolitan area; or otherwise interfering with plaintiffs or other Jewish persons or organizations in their right to be secure in their persons and property, to hold real and personal property and to travel interstate;

c) Enter judgment awarding plaintiffs damages as follows: $3000 as compensatory damages for repainting the walls of the synagogue, and compensatory damages for mental and emotional distress and punitive damages for the defendants' willful and wanton conduct in such substantial amount as, in light of the facts adduced, is just. Any and all damages recovered by plaintiffs will be contributed to the Montgomery County Human Relations Commission;

d) Award plaintiffs their costs and attorneys' fees as provided by law; and

e) Grant such other relief as may be just.

HOGAN & HARTSON

By /s/ Joseph M. Hassett
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APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

Civil Action No. R84-880

SHAARE TEFILA CONGREGATION, *et al.*,
Plaintiffs,

v.

JOHN WILLIAM COBB, *et al.*,
Defendants.

DECLARATION OF MARSHALL S. LEVIN

1. I am the Executive Director of Shaare Tefila Congregation. I held that position on November 1, 1982.

2. On the night of November 1, 1982, I attended a meeting of the Congregation Board of Directors at the synagogue. I remained after the meeting to speak with the President of the Congregation when a call came through at approximately 10:30 p.m. that the car of one of the Board Members had been spray-painted with a swastika while parked outside the synagogue during the meeting. I went outside to search for possible further damage and discovered that the outside walls of the synagogue had been extensively defaced with anti-Semetic slogans and symbols.

3. The spray-painted slogans and symbols remained on the outside walls of the synagogue for six days and I had frequent occasion to view them. I have examined the photographs numbered 1 thru 6 which are Attachments to this Declaration. The photographs accurately portray the outside walls of the synagogue as they appeared from the night of November 1, 1982, until November 7, 1982.

4. The synagogue of Shaare Tefila Congregation is located in Silver Spring, Maryland. It is approximately 2 miles from the District of Columbia line.

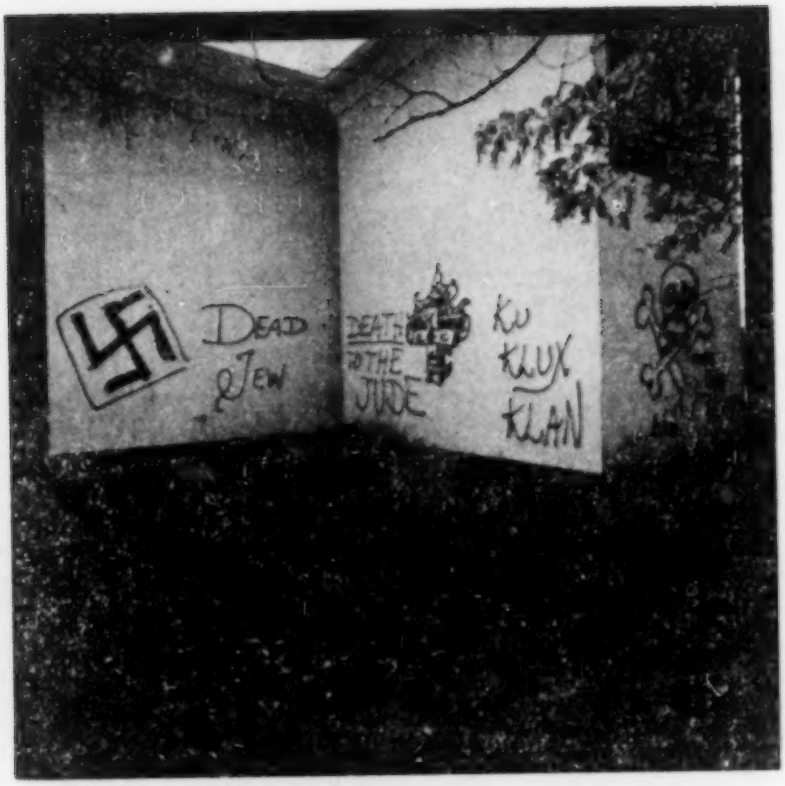
5. As Executive Director of the Congregation, I am responsible, among other duties, for supervising its membership list. Members of Shaare Tefila Congregation reside in Maryland, the District of Columbia, and Virginia.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Marshall S. Levin
MARSHALL S. LEVIN

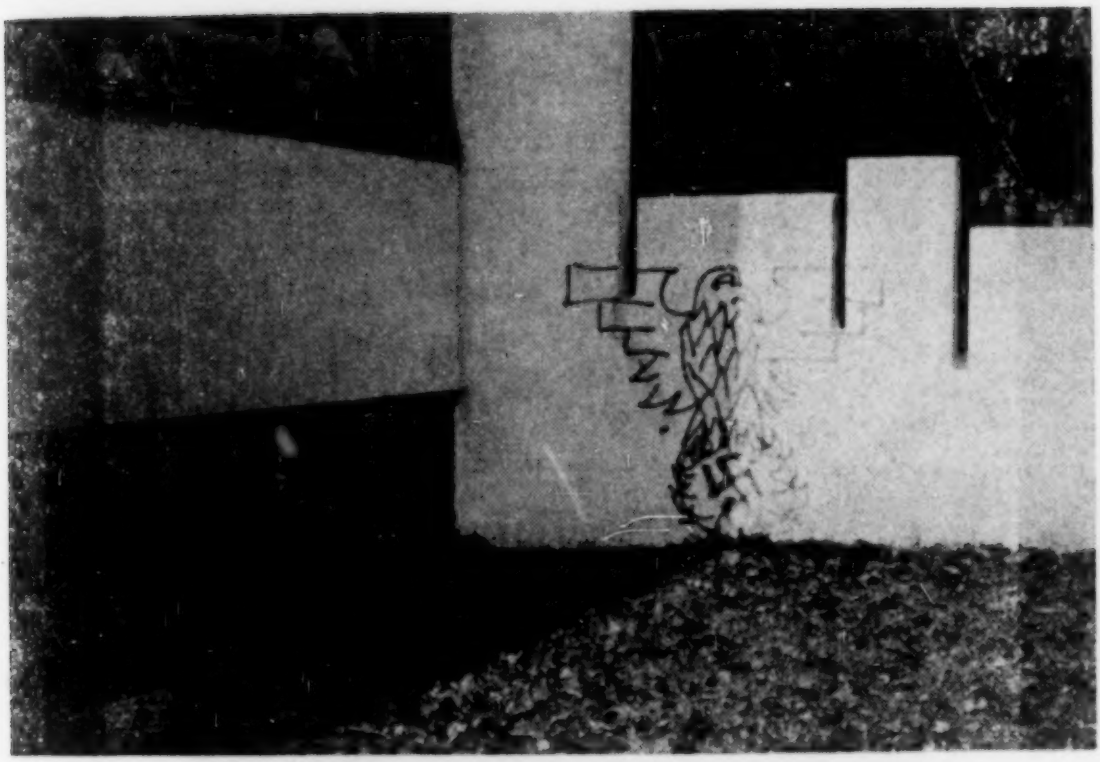
Executed on 12/17/84.

ATTACHMENT 1



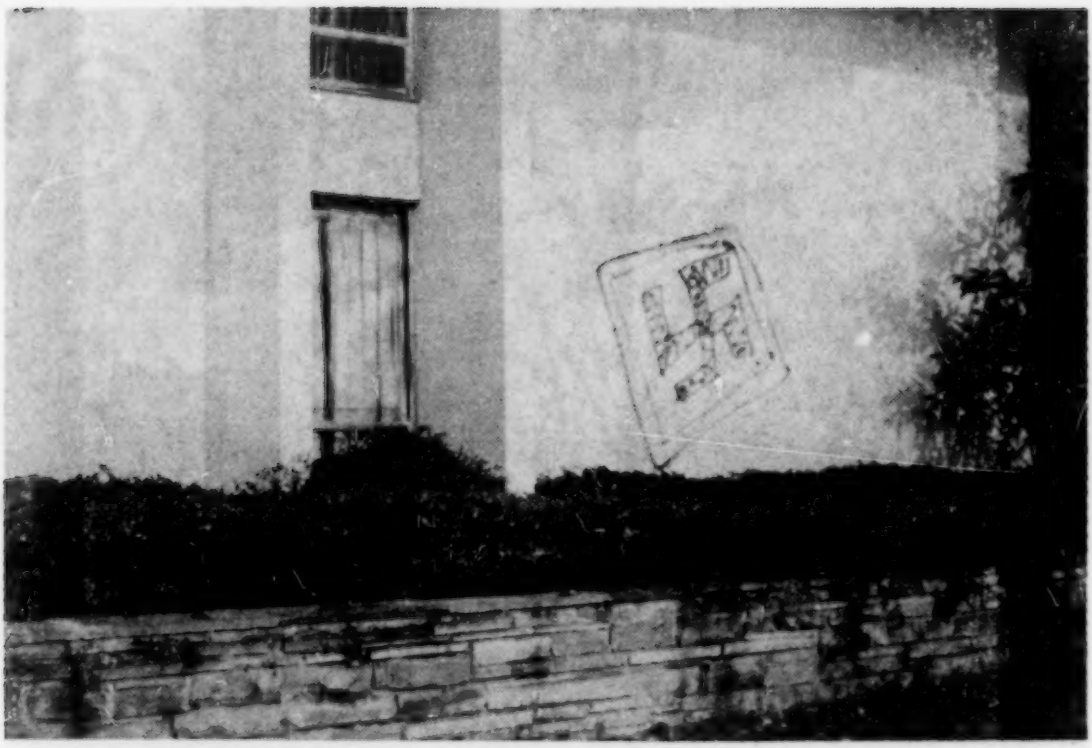
ATTACHMENT 2

ATTACHMENT 3

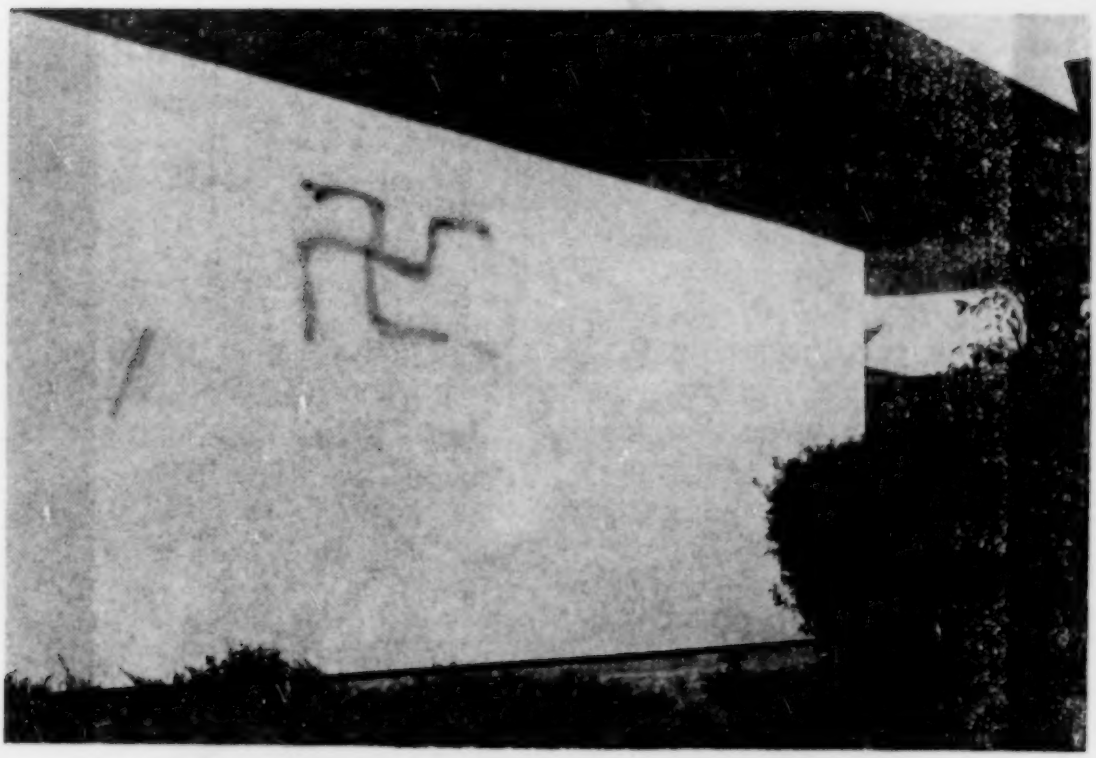


ATTACHMENT 4

ATTACHMENT 5



ATTACHMENT 6



APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

Civil Action No. R84-880

SHAARE TEFILA CONGREGATION, *et al.*,
Plaintiffs,

v.

JOHN WILLIAM COBB, *et al.*,
Defendants.

DECLARATION OF DAVID M. CHALMERS

1. I am a Professor in the Department of History at the University of Florida, Gainesville, Florida. I received my bachelor's degree from Swarthmore College in 1949 and my PhD. in history from the University of Rochester in 1955. I have been a Fulbright exchange professor at the Universities of Ceylon, Tokyo, and the Philippines.

2. Among my current activities is service as the Chair of the Program Committee of the Southern Historical Association. I have also been on the Executive Council of the Southern Historical Association, on the Board of Editors of *The Journal of Southern History* and a Consulting Editor of *American Studies International.*

3. I have written or edited six books, including *Hooded Americanism: The History of the Ku Klux Klan* (Doubleday, 1965, 2nd Rev. Ed. Franklin Watts, 1981). *Hooded Americanism* is a comprehensive study of the Klan from its inception shortly after the Civil War to its contemporary activity. In the course of researching and writing *Hooded Americanism,* I reviewed extensive Klan

writings and literature about the Klan. In addition to *Hooded Americanism*, I have published numerous journal and encyclopedia articles on the Ku Klux Klan. A partial list of titles is attached as Attachment A to this Declaration.

4. As a result of my research and writing described above, I have developed extensive familiarity with the history and ideology of the Ku Klux Klan. In addition to the publication of formal studies, I have maintained an active interest in and familiarity with the Ku Klux Klan and various other similar organizations.

5. Based on my experience and familiarity with the Ku Klux Klan, I am aware that a prevalent belief among the various Ku Klux Klan groups is that Jewish people are racially distinct from whites.

6. I have examined the photographs of the symbols and slogans painted on the synagogue of Shaare Tefila Congregation which are attached to the Declaration of Marshall S. Levin. I recognize the burning cross as the symbol of the Ku Klux Klan. One of the Klan's methods of harassing and intimidating Blacks, Jews, or others it finds abhorrent historically has been to burn a cross on that person's property.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ David M. Chalmers
DAVID M. CHLMERS

Executed on 19 December 1984.

David Chalmers
University of Florida

Articles

"The Rise and Fall of the Invisible Empire of the Ku Klux Klan," CONTEMPORARY REVIEW (London), 237 (1980), 57-64.

"Rule by Terror, The History of the Ku Klux Klan," AMERICAN HISTORY *Illustrated*, XIV (January 1980), 8-9, 44-48; (February 1980).

"George W. Norris, A Virtuous, Old-fashioned Biography, But Neither Times Nor Life," REVIEWS IN AMERICAN HISTORY, 7 (September 1979), 413-417.

"Race and Racial Thinking," NEW-YORK HISTORICAL SOCIETY QUARTERLY, LVI (April 1972), 155-161.

"The Ku Klux Klan in the 1920s," THE MISSISSIPPI QUARTERLY, XVIII (1965), 234-247.

"The Ku Klux Klan and the Radical Right," in THE RADICAL RIGHT: Proceedings of the Sixth Annual Intergroup Relations Conference (University of Houston 1965), pp. 3-9.

"American Studies in Japan and East Asia," EXCHANGE, IV (1968), 47-54.

"The Ku Klux Klan in the Sunshine State: The 1920s," FLORIDA HISTORICAL QUARTERLY, XLII (1964), 209-215.

THE UNITED STATES: LAND OF THREE HUNDRED RELIGIONS, Buddhist University Press (Colombo, 1963), 35pp.

"Ceylon and American Communalism," UNIVERSITY OF CEYLON REVIEW, XIX (1961), 40-44.

"From Robber Barons to Industrial Statesmen: Standard Oil and the Business Historians," AMERICAN JOURNAL OF ECONOMICS AND SOCIOLOGY, 20 (1960), 47-58.

"The Tammany Tiger Runs Scared," THE PROGRESSIVE, 24 (July 1960), 18-22.

"The Muckrakers and the Growth of Corporate Power," AMERICAN JOURNAL OF ECONOMICS AND SOCIOLOGY, 18 (1959), 295-311.

"Ray Stannard Baker's Search for Reform," JOURNAL OF THE HISTORY OF IDEAS, XIX (1958), 422-434.

Encyclopedia Articles

WORLD BOOK ENCYCLOPEDIA
GROLIER ENCYCLOPEDIA
FUNK & WAGNALLS
ENCYCLOPEDIA AMERICANA
AMERICAN PEOPLE'S ENCYCLOPEDIA
DICTIONARY OF AMERICAN HISTORY
ENCYCLOPEDIA OF SOUTHERN HISTORY
DICTIONARY OF SOUTHERN RELIGION

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

Civil Action No. R84-880

SHAARE TEFILA CONGREGATION, *et al.*,
Plaintiffs,

v.

JOHN WILLIAM COBB, *et al.*,
Defendants.

DECLARATION OF ROBERT WOLFE

1. I am Chief of the Modern Military Headquarters Branch of the National Archives. Among my other responsibilities, I am the custodian of captured documents of the Third Reich.

2. I served as an infantry officer in the South Pacific and Europe during the years 1942 to 1945. Thereafter I was in the Information Control Division of the United States Military Government of Germany until October 1948. I received the degree of Bachelor of Philosophy from the University of Vermont in 1942 and a Master of Philosophy from Columbia University as of 1955.

3. I have served the National Archives since 1961. Before my present position, I served successively as a specialist for captured records and for Modern European history and as chief of its Captured Records Branch. I joined the National Archives' staff upon concluding service as a member of the American Historical Association team microfilming captured records at the World War II Records Cente[illegible]1 Alexandria, Virginia.

4. I have written or contributed to several National Archives finding aids for captured records, and have presented papers and commentary on captured records and related topics at American Historical Association Meetings and other symposia and conferences. A list of my publications and papers are Attachment A to this Declaration. I have been on the Board of Directors of the American Committee on the History of the Second World War since 1972, and of the Conference Group on German Politics from 1975 to 1983. I was appointed Special Advisor to Eli Weisel, Chairman of the United States Holocaust Memorial Council, in May 1982. I was elected to the Executive Board of the Conference Group for Central European History of the American Historical Association for a two-year term beginning in January 1983.

5. In addition to my other activities, I have directed conferences at the National Archives on captured records and on the Nuremberg trials, respectively, and edited the published proceedings of the conference on *Captured German and Related Records* (Ohio U. Press 1975). I visited German archives and historical institutes as a guest of the Federal German Government in 1965. As a guest of the Polish Government, in 1979 I visited Polish archives to examine records of the German occupation of that country from 1939 to 1944. I have been Archival Consultant to the State Department for the Berlin Document Center since 1969. I was awarded the Merit Cross, First Class, of the Federal Republic of Germany, on March 15, 1979.

6. As a result of my experience and activities described above, I have developed extensive knowledge of the records kept by the German government and by the Nazi Party from 1919 to May 8, 1945, and the contents of those documents. I also have extensive knowledge of the Nazi ideology reflected in those documents.

7. It was one of the central tenets of Nazi ideology that Jews were defined as racially distinct from Aryan, or white, German citizens. This principle was not only a basic aspect of Nazi Party ideology as stated in points 4 to 6 and 23 of the Party Program promulgated on February 24, 1920, but was incorporated into German law by the Nuremberg Laws of September 15, 1935 and November 14, 1935, which defined Jews as a specific and distinct race and withdrew from Jews the rights of German citizens. *See* Attachments B and C to this Declaration.

8. I have examined the photographs of the symbols and slogans painted on the synagogue of Shaare Tefila Congregation which are attached to the Declaration of Marshall S. Levin. The swastika was the symbol of the Nazi Party from its inception, and the phrases "DEAD JEW," "DEATH TO THE JUDE" (Jude is German for Jew), and "IN, TAKE A SHOWER JEW" can be identified as references to the Third Reich's "final solution to the Jewish problem"—the Holocaust. The phrase "TOTEN KAMF RABAND" next to the skull and crossbones painted on the synagogue is apparently a reference to the Totenkopfverbände, which were the "death head units" of concentration camp guards from 1936 through World War II. The skull and crossbones was the insignia of the Totenkopfverbände.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Robert Wolfe
ROBERT WOLFE

Executed on December 20, 1984.

ATTACHMENT A

Publications and Papers of Robert Wolfe, Chief Modern Military Headquarters Branch, National Archives

Guides to German Records Microfilmed at Alexandria, Va.,

No. 36. Miscellaneous German Records Collection, Part III, 1962 (co-author).

No. 37. Records of Headquarters, Germany Navy High Command, 1962.

No. 33. Records of the Reichsfuehrer-SS and Chief of Germany Police, Part II, 1961, (co-author); No. 39. Part III, 1963 (principle author); and No. 81. Part IV, 1982, (co-author).

Editor, *Captured German and Related Records* (Ohio University Press, 1974).

"Current and Future National Archives Programs for Captured Records," National Archives Conference on Captured German and Related Records, November 13, 1968 (published in *Captured German and Related Records*, cited above).

"Captured Foreign Records as Resources for the Study of U.S. Foreign Relations," National Archives Conference on the Archives of U.S. Foreign Relations, June 17, 1969.

"The Ideology of Elitism in the SS," commentary, Annual Meeting of the AHA, Washington, D.C., December 30, 1969.

"Putative Threat to National Security as a Nurenberg Alibi for Genocide," Conference on the Church Struggle and Holocaust, March 1974; published in *Annals of the American Association for the Political and Social Sciences*, July 1980.

"The London Charter," AHA Annual Meeting, Chicago, December 1974.

"From Information Control to Media Freedom in Occupied Germany," AHA Annual Meeting, San Francisco, 1978.

"To Embellish the Truth of the Holocaust is Unnecessary," International Liberators Conference, October 1981.

"Nazi Paperwork for the Final Solution," AHA, San Francisco, December 1983.

Editor, *Americans as Proconsuls: U.S. Military Government in Germany and Japan, 1944-52* (Southern Illinois University Press, Carbondale, Illinois, 1984).

Participant, Aspen Institute Berlin and Hannover University conference on "American Higher Educational and Research Policy in Germany, 1945-1952," July 1-7, 1984.

"Sharing Records of Mutual Archival Concern to the Federal Republic of Germany and the United States of America," paper presented in the Special Plenary Session of the International Congress on Archives, Bonn, September 21, 1984.

Chief interviewer and prospective co-editor of an oral history project of the Conference Group on German Politics entitled "Foundations of the Federal German Republic," subsidized by a McCloy Fund grant. Already interviewed (transcriptions available) have been Gen. Lucius D. Clay (2 hours, 1977), John J. McCloy (2 hours, 1979), and James J. Riddleberger (6 hours, 1979-1980).

ATTACHMENT B

The Programme of the German Workers' Party is designed to be of limited duration. The leaders have no intention, once the aims announced in it have been achieved, of establishing fresh ones, merely in order to increase, artificially, the discontent of the masses and so ensure the continued existence of the Party.

1. We demand the union of all Germans in a Greater Germany on the basis of the right of national self-determination.

2. We demand equality of rights for the German people in its dealings with other nations, and the revocation of the peace treaties of Versailles and Saint-Germain.

3. We demand land and territory (colonies) to feed our people and to settle our surplus population.

4. Only members of the nation may be citizens of the State. Only those of German blood, whatever their creed, may be members of the nation. Accordingly, no Jew may be a member of the nation.

5. Non-citizens may live in Germany only as guests and must be subject to laws for aliens.

6. The right to vote on the State's government and legislation shall be enjoyed by the citizens of the State alone. We demand therefore that all official appointments, of whatever kind, whether in the Reich, in the states or in the smaller localities, shall be held by none but citizens.

We oppose the corrupting parliamentary custom of filling posts merely in accordance with party considerations, and without reference to character or abilities.

7. We demand that the State shall make it its primary duty to provide a livelihood for its citizens. If it should prove impossible to feed the entire population, foreign nationals (non-citizens) must be deported from the Reich.

8. All non-German immigration must be prevented. We demand that all non-Germans who entered Germany after 2 August 1914 shall be required to leave the Reich forthwith.

9. All citizens shall have equal rights and duties.

10. It must be the first duty of every citizen to perform physical or mental work. The activities of the individual must not clash with the general interest, but must proceed within the framework of the community and be for the general good.

We demand therefore:

11. The abolition of incomes unearned by work.

The breaking of the slavery of interest

12. In view of the enormous sacrifices of life and property demanded of a nation by any war, personal enrichment from war must be regarded as a crime against the nation. We demand therefore the ruthless confiscation of all war profits.

13. We demand the nationalization of all businesses which have been formed into corporations (trusts).

14. We demand profit-sharing in large industrial enterprises.

15. We demand the extensive development of insurance for old age.

16. We demand the creation and maintenance of a healthy middle class, the immediate communalizing of big department stores, and their lease at a cheap rate to small traders, and that the utmost consideration shall be shown to all small traders in the placing of State and municipal orders.

17. We demand a land reform suitable to our national requirements, the passing of a law for the expropriation of land for communal purposes without compensation; the

abolition of ground rent, and the prohibition of all speculation in land.

18. We demand the ruthless prosecution of those whose activities are injurious to the common interest. Common criminals, usuers, profiteers, etc., must be punished with death, whatever their creed or race.

19. We demand that Roman Law, which serves a materialistic world order, be replaced by a German common law.

20. The State must consider a thorough reconstruction of our national system of education (with the aim of opening up to every able and hard-working German the possibility of higher education and of thus obtaining advancement). The curricula of all educational establishments must be brought into line with the requirements of practical life. The aim of the school must be to give the pupil, beginning with the first sign of intelligence, a grasp of the notion of the State (through the study of civic affairs). We demand the education of gifted children of poor parents, whatever their class or occupation, at the expense of the State.

21. The State must ensure that the nation's health standards are raised by protecting mothers and infants, by prohibiting child labour, by promoting physical strength through legislation providing for compulsory gymnastics and sports, and by the extensive support of clubs engaged in the physical training of youth.

22. We demand the abolition of the mercenary army and the formation of a people's army.

23. We demand legal warfare on deliberate political mendacity and its dissemination in the press. To facilitate the creation of a German national press we demand:

(a) that all editors of, and contributors to newspapers appearing in the German language must be members of the nation;

(b) that no non-German newspapers may appear without the express permission of the State. They must not be printed in the German language;

(c) that non-Germans shall be prohibited by law from participating financially in or influencing German newspapers, and that the penalty for contravening such a law shall be the suppression of any such newspaper, and the immediate deportation of the non-Germans involved.

The publishing of papers which are not conducive to the national welfare must be forbidden. We demand the legal prosecution of all those tendencies in art and literature which corrupt our national life, and the suppression of cultural events which violate this demand.

24. We demand freedom for all religious denominations in the State, provided they do not threaten its existence nor offend the moral feelings of the German race.

ATTACHMENT C

5 *Law for the Protection of German Blood and German Honour, 15 September 1935*

Entirely convinced that the purity of German blood is essential to the further existence of the German people, and inspired by the uncompromising determination to safeguard the future of the German nation, the Reichstag has unanimously resolved upon the following law, which is promulgated herewith:

Section 1

1. Marriages between Jews and citizens of German or kindred blood are forbidden. Marriages concluded in defiance of this law are void, even if, for the purpose of evading this law, they were concluded abroad.

2. Proceedings for annulment may be initiated only by the Public Prosecutor.

Section 2

Sexual relations outside marriage between Jews and nationals of German or kindred blood are forbidden.

Section 3

Jews will not be permitted to employ female citizens of German or kindred blood as domestic servants.

Section 4

1. Jews are forbidden to display the Reich and national flag or the national colours.

2. On the other hand they are permitted to display the Jewish colours. The exercise of this right is protected by the State.

Section 5

1. A person who acts contrary to the prohibition of Section 1 will be punished with hard labour.

2. A person who acts contrary to the prohibition of Section 2 will be punished with imprisonment or with hard labour.

3. A person who acts contrary to the provisions of Sections 3 or 4 will be punished with imprisonment up to a year and with a fine, or with one of these penalties.

Section 6

The Reich Minister of the Interior in agreement with the Deputy Führer and the Reich Minister of Justice will issue the legal and administrative regulations required for the enforcement and supplementing of this law.

Section 7

The law will become effective on the day after its promulgation; Section 3, however, not until 1 January 1936.

6 *The Reich Citizenship Law, 15 September 1935*

The Nuremberg Laws by their general nature formalized the unofficial and particular measures taken against Jews up to 1935. The Nazi leaders made a point of stressing the consistency of this legislation with the Party programme which demanded that Jews should be deprived of their rights as citizens. The Reich Citizenship Law stripped Jews of their German citizenship and introduced a new distinction between 'Reich citizens' and 'nationals'. Certificates of Reich citizenship were in fact never introduced and all Germans other than Jews were until 1945 provisionally classed as Reich citizens.

Article 1

1. A subject of the State is a person who belongs to the protective union of the German Reich, and who therefore has particular obligations towards the Reich.

2. The status of subject is acquired in accordance with the provisions of the Reich and State Law of Citizenship.

Article 2

1. A citizen of the Reich is that subject only who is of German or kindred blood and who, through his conduct, shows that he is both desirous and fit to serve the German people and Reich faithfully.

2. The right to citizenship is acquired by the granting of Reich citizenship papers.

3. Only the citizen of the Reich enjoys full political rights in accordance with the provision of the laws.

Article 3

The Reich Minister of the Interior in conjunction with the Deputy of the Führer will issue the necessary legal and administrative decrees for carrying out and supplementing this law.

7 *First Regulation under the Reich Citizenship Law, 14 November 1935*

These laws also paved the way for a more systematic persecution of the Jews, for the Reich Citizenship Law was followed during the Third Reich by a series of supplementary regulations. A major outstanding problem was that of the definition of a 'Jew'. Since the beginning of 1935 the matter had been discussed by Party leaders, who pressed for the application of legislation to all half-Jews. The Nuremberg Laws, drafted by civil servants, failed to provide a clear answer (Hitler had struck out the term 'full Jews' from the draft of the Citizenship Law as it involved a new classification). Dr. Bernhard Lösener, a high official in the Reich Ministry of the Interior who had assisted in the drafting of the Nuremberg Laws, produced a memorandum on 1 November which discussed the position of half-Jews. Lösener proposed the

inclusion of those half-Jews who were married to a Jewish person and who adhered to the Jewish religion. (The choice of religion for want of a better alternative was inconsistent with Nazi ideology which saw the Jew as a racial rather than a religious being.) Lösener's suggestions were included in the first regulation under the Citizenship Law, issued on 14 November 1935:

Article 1

1. Until further regulations regarding citizenship papers are issued, all subjects of German or kindred blood, who possessed the right to vote in the Reichstag elections at the time the Citizenship Law came into effect, shall for the time being possess the rights of Reich citizens. The same shall be true of those to whom the Reich Minister of the Interior, in conjunction with the Deputy of the Führer, has given preliminary citizenship.

2. The Reich Minister of the Interior, in conjunction with the Deputy of the Führer, can withdraw the preliminary citizenship.

Article 2

1. The regulations in Article 1 are also valid for Reich subjects of mixed Jewish blood.

2. An individual of mixed Jewish blood is one who is descended from one or two grandparents who were racially full Jews, in so far as he or she does not count as a Jew according to Article 5, paragraph 2. One grandparent shall be considered as full-blooded if he or she belonged to the Jewish religious community.

Article 3

Only the Reich citizen, as bearer of full political rights, exercises the right to vote in political affairs or can hold office. The Reich Minister of the Interior, or any agency empowered by him, can make exceptions during the

transition period, with regard to occupation of public office. The affairs of religious organizations will not be affected.

Article 4

1. A Jew cannot be a citizen of the Reich. He has no right to vote in political affairs and he cannot occupy public office.

2. Jewish officials will retire as of 31 December 1935. If these officials served at the front in the world war, either for Germany or her allies, they will receive in full, until they reach the age limit, the pension to which they were entitled according to the salary they last received; they will, however, not advance in seniority. After reaching the age limit, their pensions will be calculated anew, according to the salary last received, on the basis of which their pension was computed.

3. The affairs of religious organizations will not be affected.

4. The conditions of service of teachers in Jewish public schools remain unchanged until new regulations for the Jewish school systems are issued.

Article 5

1. A Jew is anyone who is descended from at least three grandparents who are racially full Jews. Article 2, para. 2, second sentence will apply.

2. A Jew is also one who is descended from two full Jewish parents, if (a) he belonged to the Jewish religious community at the time this law was issued, or joined the community later, (b) he was married to a Jewish person, at the time the law was issued, or married one subsequently, (c) he is the offspring of a marriage with a Jew, in the sense of Section 1, which was contracted after the Law for the Protection of German Blood and German Honour became effective, (d) he is the offspring of an

extramarital relationship with a Jew, according to Section 1, and will be born out of wedlock after 31 July 1936.

Article 6

1. Requirements for the pureness of blood as laid down in Reich Law or in orders of the NSDAP and its echelons —not covered in Article 5—will not be affected.

2. Any other requirements for the pureness of blood, not covered in Article 5, can be made only by permission of the Reich Minister of the Interior and the Deputy Führer. If any such demands have been made, they will be void as of 1 January 1936, if they have not been requested by the Reich Minister of the Interior in agreement with the Deputy Führer. These requests must be made by the Reich Minister of the Interior.

Article 7

The Führer and Reich Chancellor can grant exemptions from the regulations laid down in the law.